BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below

The opinion of the United States District Court, Southern District of New York, (R. 52-57) is reported at 59 F. Supp. 463. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 69-72) is reported at 152 F. 2d 847.

BASIS FOR JURISDICTION

It is competent for this Court to require by certiorari that the cause be certified to it for review pursuant to the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, amending and reenacting Section 240(a) of the Judicial Code, 28 U. S. C. A., Sec. 347, and Rule 38 of the Rules of this Court.

The judgment of the Circuit Court of Appeals for the Second Circuit which petitioner seeks to have reviewed was entered December 26, 1945 (R. 72).

STATEMENT OF THE CASE

The essential facts of this case have already been stated in the accompanying petition and need not be repeated here.

SPECIFICATION OF ERRORS

The errors which petitioner will urge if the writ of certiorari be granted is that the Circuit Court of Appeals for the Second Circuit erred:

1. In failing to find that claimant, a lighter captain, was "a master or member of a crew of any vessel", and therefore excluded from the application of the Longshore-

men's and Harbor Workers' Compensation Act in accordance with Section 3(a)(1) of that Act.

2. In failing to find that the duties of claimant, which the uncontradicted evidence showed were the maintenance and care of the vessel used for the transportation service, were purely navigational in character.

3. In failing to find that the deputy commissioner's decision with respect to coverage by the Act, is a question of law and therefore not conclusive on the courts.

4. In failing to follow its own decision in *United States Lighterage Corp.* v. *Hoey*, 142 F. 2d 484, where it held that a bargee having duties practically identical with those of claimant, was a seaman within the meaning of the Social Security Act.

5. In failing to find that this case is controlled by this Court's decision in *Norton* v. *Warner Co.*, 321 U. S. 565.

6. In affirming the judgment of the District Court.

ARGUMENT

Respondent Lindenberg Was a "Master or Member of a Crew" of a Vessel and, Therefore, Not Covered by the Provisions of the Longshoremen's and Harbor Workers' Compensation Act.

The Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as the Compensation Act) was passed in 1927 to provide that longshoremen or those mainly employed in loading, unloading, refitting and repairing ships were entitled to compensation under that Act and for them that remedy was made exclusive. (Senate Report No. 973, 69th Congress, 1st Session, page 16). On the other hand one employed in navigable waters as a

"master or member of a crew", and receiving injuries in the course of his employment, is not covered by the Compensation Act but is protected by the maritime law and may also sue under the Jones Act for injuries suffered in the course of his employment.

This Court has previously had occasion to consider the meaning of the Compensation Act. In *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, the Court held that a lighter bargeman employed on a lighter primarily for the purpose of helping unload its cargo, by standing beside the coal chute and removing obstructions as the coal flowed out, and who had no navigational duties other than throwing the ship's rope in releasing or making the boat fast, came under the Compensation Act.

And in *Norton* v. *Warner*, 321 U. S. 565, the facts showed that the duties of Rusin, the injured bargeman, consisted of taking general care of the barge, including taking care of the lines at docks, tightening or slackening them as necessary; repairing leaks; pumping out the barge; taking lines from tugs; responding to whistles from the tugs; putting out navigational lights and signals; taking orders from the tugboat when being towed; moving the barge at piers by the capstan. This Court found that Rusin was a member of the crew, even though he was the sole person aboard or employed upon the barge, and not covered by the Compensation Act.

In *Tucker* v. *Branham, Deputy Commissioner,* decided by the Circuit Court of Appeals for the Third Circuit, 151 F. 2d 96, the Deputy Commissioner had found that the deceased employee, Dillon, (1) had been employed on the barge "Army" as a caretaker, (2) that it was his duty when excessive leakage occurred, to attend to and to supervise the loading and unloading thereof, to fasten and unfasten lines as necessary and at all times to protect the barge from damage and otherwise safeguard the interest

of its owner; (3) that his duties were limited to the barge "Army"; (4) that he was the only person employed thereon; (5) that he lived, ate and slept on the barge and bought his own meals; (6) that he was not a qualified or licensed seaman and held no seaman's papers; (7) that said barge had no motive power of its own and was towed by tug boats; (8) that its operations were confined principally to the Philadelphia harbor; (9) that the duties performed by Dillon prior to his death did not relate principally to the navigation of the said barge, but on the contrary his duties had substantially no relation to navigation, being principally the duties incident to common labor and custodial service; and (10) that Dillon was not a master or member of a crew. The Court of Appeals held that the second finding above demonstrated that Dillon aided in the navigation of the barge, and that although Dillon had some duties in respect to the loading and unloading of the barge, nevertheless these duties were for the purpose of making sure that the loading or unloading was done in such a way that the barge would not be injured by excessive strain or capsized by unequal loads. The Court therefore concluded that Dillon was a "master or member of the crew" and not covered by the Compensation Act.

The record in the case at bar discloses that respondent Lindenberg instructed the longshoremen where to place the cargo as it was brought aboard the vessel for the purpose of proper stowage (R. 29); he remained with the vessel when it was towed from one point to another, and attended to lines (R. 24); he painted the lighter and took care of the upkeep of the engine (R. 25, 27); he took orders from petitioner's dispatching department except when in tow (R. 27); he handled the lines between the tug and his lighter, which he stated it was his duty to do (R. 24); he

observed that the merchandise was properly stowed so that no damage might come to the vessel while it was in tow (R. 29); he was responsible for the protection of the lighter from injury or damage (R. 29); he examined the boat for leaks (R. 30-31); pumped the water when it reached a certain level in the hold of the lighter (R. 34); slept on the lighter (R. 34) and ate aboard ship from time to time (R. 22); had a stove in the cabin of the lighter which could be used for the purpose of making coffee (R. 36); took general care of the barge and observed the condition of the lines when the lighter was berthed to see that they remained taut and fixed the lines as the tide rose and fell (R. 36); he observed the approach of other lighters carefully to avoid injury or damage to his lighter when they tied up alongside of it (R. 37); took care of leaks (R. 37); was towed at night on occasions (R. 37) and used the engine of the lighter to move the lighter from one berth to another berth at the same pier (R. 37). On the day of his injuries he was engaged in painting the cabin of his lighter (R. 45). On these facts the Circuit Court of Appeals for the Second Circuit concluded that Lindenberg was not a "master or member of a crew of any vessel" and therefore covered by the Compensation Act.

The Commissioner in the instant case conceded that there was confusion in the Second Circuit as to the right of an employee in the same class with Lindenberg to seek compensation or to bring an action under the Jones Act for injuries received by him in the course of his employment, and recognized that employers, such as petitioner, would probably have to cover themselves by insurance in two ways because of the Compensation Act and also because of the possible right of action under the Jones Act. (R. 51)

In view of the decision in the instant case in the Second Circuit, and the decision in the *Tucker Case* in the Third

Circuit, great uncertainty confronts both employers, such as petitioner, and employees, such as Lindenberg. It is thus possible at the present time that if a lighter captain working for petitioner (petitioner being authorized to do business in both New York and New Jersey) were to injure his right leg when the lighter is leaving a New York pier and on the same day were to injure his left leg when the lighter reaches the New Jersey pier, he could not sue under the Jones Act in the Second Circuit for injuries to his right leg, but would be limited to his rights under the Compensation Act, and as to his left leg he would not be entitled to compensation in the Third Circuit but would be forced to sue under the Jones Act.

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

CHARLES LANDESMAN,
JOHN J. HICKEY,
WALTER W. AHRENS,
Counsel for Petitioner.